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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 CONFEDERATED TRIBES AND
8 BANDS OF THE YAKAMA NATION,
9 a federally-recognized Indian tribal
10 government and as *parens patriae* on
behalf of the Enrolled Members of the
Confederated Tribes and Bands of the
Yakama Nation;

11 v.
12

13 ERIC H. HOLDER, JR., Attorney
General of the United States; et al.,

14 Defendants.
15

NO: CV-11-3028-RMP

ORDER DENYING THE FEDERAL
DEFENDANTS' MOTION FOR
RECONSIDERATION

16 This matter comes before the Court on a motion for reconsideration by the
17 Federal Defendants, ECF No. 177. Telephonic argument occurred on November 4,
18 2011. The Court has reviewed the parties' filings with respect to this motion,
19 together with the remaining record in this case, and is fully informed.

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21 ORDER DENYING THE FEDERAL DEFENDANTS' MOTION FOR
RECONSIDERATION ~ 1

1 BACKGROUND

2 The Plaintiff brought the instant action on March 8, 2011. On June 10,
3 2011, the Federal Defendants filed a motion for a protective order in which they
4 sought to stay discovery pending the resolution of a motion to dismiss that they
5 had not yet filed. ECF No. 43. On June 22, 2011, the Federal Defendants filed the
6 motion to dismiss. ECF No. 50.

7 On September 12, 2011, the Court granted in part and denied in part the
8 Federal Defendants' motion for a protective order. ECF No. 159. The Court
9 allowed limited discovery relating to policies governing the Federal Defendants'
10 duty, if any, to notify the Yakama Nation prior to entry upon Yakama land,
11 discovery relating to the actions of the Federal Defendants regarding notification of
12 the Federal Defendants' alleged entry onto Yakama land on February 16, 2011,
13 and discovery relating to the actions of the Federal Defendants in effecting that
14 entry. ECF No. 159 at 10. The Federal Defendants now seek reconsideration of
15 that order.

16 DISCUSSION

17 The Federal Defendants purport to bring this motion pursuant to Rule 59. In
18 the motion, the Federal Defendants assert three arguments: (1) that the court erred
19 in holding that the second sentence of 5 U.S.C. § 702 of the Administrative
20 Procedure Act ("APA") waives sovereign immunity for non-constitutional, non-

1 APA claims; (2) that there is no discoverable evidence needed to address the
2 Federal Defendants' Motion to Dismiss because if an internal policy document is
3 unpublished, it cannot bind the agency; and (3) that if the Court decides to allow
4 discovery, the scope of discovery contained in the original order is overbroad and
5 should be narrowed.

6 *Procedural Posture*

7 As a preliminary matter, the Plaintiff challenges the Federal Defendants'
8 motion for reconsideration as improper because motions for reconsideration under
9 Rule 59 apply only to final judgments or appealable interlocutory orders. ECF No.
10 184 at 2. The Plaintiff is correct that Rule 59(e) motions are appropriate only to
11 review a "judgment." Fed. R. Civ. P. 59(e). Judgments are defined as orders from
12 which an appeal lies. Fed. R. Civ. P. 54(a). Where a motion for reconsideration is
13 brought challenging a non-final, non-appealable order, the motion is directed at the
14 inherent jurisdiction of a court to revisit its interlocutory orders. *United States v.*
15 *Martin*, 226 F.3d 1042, 1049 (9th Cir. 2000). The Federal Defendants' reliance on
16 Rule 59 is misplaced, but this Court will consider the motion under its inherent
17 discretionary power.

18 *Scope of the Waiver of Sovereign Immunity under 5 U.S.C. § 702*

19 The Federal Defendants argue that this Court's September 12, 2011, order
20 misinterprets the scope of the waiver of sovereign immunity contained in 5 U.S.C.

1 § 702. The Federal Defendants assert that the Ninth Circuit’s opinion in *Veterans*
2 *for Common Sense v. Shinseki*, 644 F.3d 845 (9th Cir. 2011), establishes that
3 § 702’s waiver is limited to claims brought pursuant to the Administrative
4 Procedure Act (“APA”) and claims arising under the Constitution. The Court
5 disagrees. *Shinseki* stands for the principle that the waiver of sovereign immunity
6 contained within the second sentence of § 702 is not limited to actions brought
7 pursuant to the first sentence of § 702. 644 F.3d at 867. While the question in
8 *Shinseki* was whether sovereign immunity barred a constitutional claim, the Ninth
9 Circuit did not limit its holding to constitutional claims.¹

10 In fact, the Ninth Circuit’s reasoning in *Shinseki* compels a different result.
11 The second sentence of § 702 is to be read independently of the first sentence. The
12 second sentence reads:

13 An action in a court of the United States seeking relief other than
14 money damages and stating a claim that an agency or an officer or
15 employee thereof acted or failed to act in an official capacity or under

15 ¹The fact that the *Shinseki* court applies a different analysis to the non-
16 constitutional claims in that case does not suggest that § 702’s waiver is limited to
17 constitutional and APA claims because the non-constitutional claims referred to by
18 the Federal Defendants were claims brought pursuant to the APA and thus had to
19 meet the requirements of the APA. *See Shinseki*, 644 F.3d at 868-69 (“the district
20 court properly denied Veterans’s APA challenge”).

1 color of legal authority shall not be dismissed nor relief therein be
2 denied on the ground that it is against the United States or that the
United States is an indispensable party.

3 § 702. Nothing in the second sentence limits the waiver by claim type. By its
4 plain text, the second sentence merely limits the waiver based on the type of relief
5 sought. Accordingly, the Court declines to modify its earlier ruling regarding the
6 scope of the waiver of sovereign immunity under § 702.

7 *Need for Discovery*

8 The Federal Defendants challenge the Court's ruling respecting the need for
9 discovery. The Federal Defendants argue that only published guidelines may bind
10 an agency; consequently, discovery here will be fruitless as any agency policy
11 available solely through discovery cannot legally bind the agency and give rise to a
12 possible claim under the APA. For this conclusion, the Federal Defendants rely
13 primarily on *United States v. One 1985 Mercedes*, 914 F.2d 415 (9th Cir. 1990).
14 Language from *Mercedes*, taken in isolation, would appear to support that
15 conclusion. However, that statement must be put into context.

16 The *Mercedes* court relies on *Rank v. Nimmo*, 677 F.2d 692 (9th Cir. 1982).
17 *Rank* stands for the proposition that in order for a breach of an agency's internal
18 rule to give rise to a cause of action, that rule must "have the 'force and effect of
19 law.'" *Id.* at 698. To have the force of law, a rule must be (1) substantive and not
20 merely interpretive; and (2) "conform to certain procedural requirements." *Id.*

1 (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 301 (1979)). “The first element
2 requires that the rules be legislative in nature, affecting individual rights and
3 obligations.” *Id.* (citing *Chrysler*, 441 U.S. at 302). “The second element requires
4 that the agency promulgate the rules pursuant to a specific statutory grant of
5 authority and in conformance with the procedural requirements imposed by
6 Congress.” *Id.* (citing *Chrysler*, 441 U.S. at 302-03).

7 The *Rank* court rendered its decision under the first element and held that a
8 Veteran’s Administration Handbook and various Veteran’s Administration
9 circulars did not carry the force of law because they were general statements of
10 policy and procedure and not legislative in character. *Id.* Additionally, “the fact
11 that the Handbook and circulars . . . were neither published in the Federal Register
12 nor disseminated to the public for scrutiny and comment offer[ed] *further support*
13 for [the] view that th[e] publications were not intended to have the force and effect
14 of law.” *Id.* (emphasis added). The *Rank* court did not state that dissemination to
15 the public for scrutiny and comment or publication was dispositive. *See id.*
16 Importantly, the *Rank* court did “not reach the question [of] whether the Handbook
17 and circulars were the product of requisite procedures.” *Id.*

18 The *Mercedes* court focused on the procedural issue that the *Rank* court did
19 not reach, yet the *Mercedes* court relied on *Rank* for its holding. *Mercedes*, 917
20 F.2d at 423. Due to the fact that *Rank* did not reach the procedural question, *Rank*,

1 677 F.2d at 698, the *Rank* opinion cannot stand for the principle that an
2 unpublished rule can never create legally binding rules under the APA.

3 In *Mercedes*, the Ninth Circuit reviewed the district court's decision not to
4 allow discovery of internal procedures. *Mercedes*, 917 F.2d at 418. The Circuit
5 reviewed the district court's decision under an abuse of discretion standard and
6 ultimately found that the district court did not abuse its discretion. *Id.* The
7 *Mercedes* opinion does not compel the conclusion that a district court would abuse
8 its discretion by allowing discovery of internal agency policies.

9 The internal policies that can bind an agency and give rise to a cause of
10 action under the APA are not limited to only those rules promulgated pursuant to
11 notice and comment rule making. *Alcaraz v. Immigration and Naturalization Serv.*,
12 384 F.3d 1150, 1162 (9th Cir. 2004). In light of the tension between the language
13 of *Mercedes* and the holding in *Rank*, and in light of the fact that the Ninth Circuit
14 has not cited to *Mercedes* in twenty years for the proposition that unpublished
15 policies can never bind an agency, the Court rejects the Federal Defendants'
16 interpretation that unpublished policies can never bind an agency.

17 Where facts bearing on the issue of jurisdiction are controverted, as they are
18 in this case, a district court should allow discovery. *Wells Fargo & Co. v. Wells*
19 *Fargo Exp. Co.*, 556 F.2d 406, 430 n.24 (9th Cir. 1997). The Court will allow
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1 limited discovery in this case so that Plaintiff may have an opportunity to rebut
2 Defendants' motions to dismiss.

3 *Scope of Discovery*

4 During the November 4, 2011, oral argument on the Federal Defendants'
5 motion to reconsider, the Court inquired of the Plaintiff as to whether the scope of
6 discovery needed by the Plaintiff to rebut the motions to dismiss could be narrowly
7 tailored. After a colloquy with the Court, the Plaintiff had no objection at this
8 point in the litigation to focusing discovery on the issue of whether agency
9 guidelines are discretionary or nondiscretionary.

10 In light of the Plaintiff's position on discovery, the Court will restate the
11 scope of limited discovery granted by ECF No. 159 accordingly.

12 Therefore, **IT IS HEREBY ORDERED:**

13 1. Federal Defendants' Motion for Reconsideration, **ECF No. 177**, is
14 **DENIED**.

15 2. The Federal Defendants shall comply with discovery requests regarding
16 any written policies, guidelines, and directives, published or unpublished, that
17 relate to any duty of the Federal Defendants to notify the Yakama before entering
18 Yakama land and any policies governing the limitations, if any, on the Federal
19 Defendants' conduct while on Yakama land. In responding to discovery requests,
20 the Federal Defendants should be mindful that all such policies should be

1 produced, whether they appear mandatory or discretionary. The Court will
2 ultimately determine the character of the policies. If after receiving the initial
3 discovery from the Federal Defendants, the Plaintiff finds that additional discovery
4 is necessary in order to respond to the motions to dismiss, Plaintiff may move the
5 Court for additional limited discovery.

6 3. In light of the delay caused by the instant motion, the currently scheduled
7 hearing date of January 17, 2012, would not allow sufficient time to complete the
8 limited discovery enabled by this Order. Accordingly, the Court makes the
9 following scheduling changes:

10 a. The Hearing on the Federal Defendants' Motion to Dismiss, ECF
11 No. 50, is reset to **February 28, 2012 at 9:30 a.m. in Spokane, WA.**

12 b. All discovery under this order is to be completed by **January 3, 2012.**

13 c. The Plaintiff may supplement its response memorandum in light of
14 discovery. Such supplemental memorandum, if any, shall be filed on or
15 before **January 24, 2012.**

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d. The Federal Defendants' reply memorandum, if any, shall be filed on or before **February 7, 2012**.

IT IS SO ORDERED.

The District Court Executive is hereby directed to enter this Order and to provide copies to counsel.

DATED this 21st of November, 2011.

s/ Rosanna Malouf Peterson
ROSANNA MALOUF PETERSON
Chief United States District Court Judge